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10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 In Re:
14 PG&E CORPORATION,
15 - and -
16 PACIFIC GAS AND ELECTRIC
17 COMPANY,
18 Debtors.
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Bankruptcy Case
Case No.: 19-30088-DM (Lead Case)
Chapter 11

(Jointly Administered)

**BLACK & VEATCH
CONSTRUCTION, INC.'S
OPPOSITION TO THE OFFICIAL
COMMITTEE OF TORT
CLAIMANTS' MOTION TO
ESTABLISH PROCEDURES FOR
DISCOVERY PRECEDING PLAN
CONFIRMATION**

Hearing

Date: March 10, 2020
Time: 10:00 a.m. (Pacific Time)
Place: Courtroom 17
450 Golden Gate Ave., 16th Fl.
San Francisco, CA 94102

1 Black & Veatch Construction, Inc. (“**BVCI**”) opposes the Official Committee of Tort
2 Claimants’ (the “**TCC**”) Motion to Establish Procedures for Discovery Preceding Plan Confirmation
3 (the “**Alternative Procedures Motion**”). The TCC’s Alternative Procedures Motion is an improper
4 attempt to avoid complying with the substantive protections and procedural requirements of Federal
5 Rule of Civil Procedure 45—the Rule the TCC invoked to subpoena BVCI (the “**Subpoena**”),
6 apparently at the same time it served identical subpoenas on more than 100 other non-parties.

7 BVCI objected to the TCC’s Rule 45 Subpoena in accordance with Rule 45(d)(2)(B). The
8 TCC did not acknowledge BVCI’s objections and it has not withdrawn the Subpoena. To the extent
9 the TCC seeks to compel compliance with the Subpoena, it bears the burden to do so by filing a motion
10 under Rule 45(d)(2)(B)(i), which the TCC also has not done. Instead, the TCC filed the Alternative
11 Procedures Motion seeking a generic, “aggregate” approach that conflicts with Rule 45’s procedures
12 and non-party protections.

13 BVCI has thus been left in an untenable position. It has been burdened with an invalid
14 subpoena served under Rule 45 by a party that is now asking to be excused from that very Rule. That
15 is why last week BVCI filed a Motion to Quash, again in accordance with Rule 45(d)(3) (ECF Dkt.
16 No. 5896). BVCI’s **Motion to Quash** is attached hereto as **Exhibit A**. BVCI respectfully submits
17 that it is entitled to be heard, and its Motion to Quash decided, under Rule 45.

18 However, to ensure a clear record as to its position and standing, BVCI separately files this
19 Opposition because the Alternative Procedures Motion seeks to displace Rule 45’s required
20 procedures and the critical substantive protections afforded to BVCI. For the reasons set forth in its
21 **Motion to Quash** (which it incorporates herein), and those briefly summarized below, the Alternative
22 Procedures Motion should be denied or, at least, denied with respect to BVCI:

- 23 1. **Rule 45 Cannot Be Displaced.** The Supreme Court specifically adopted detailed safeguards
24 for “Protecting a Person Subject to a Subpoena.” *See* Fed. R. Civ. P. 45(d). Those
25 protections—also secured by decades of case law—provide substantive and procedural
26 safeguards against defective, burdensome, and otherwise invalid subpoenas. *See id.* Indeed,
27 “[t]he Ninth Circuit has long held that nonparties subject to discovery requests deserve extra

1 protection from the courts,” and, having invoked Rule 45, the TCC cannot now avoid the
2 Rule’s procedures and protections. *See In re NCAA Student-Athlete Name & Likeness*
3 *Licensing Litig.*, No. 09-CV-01967 CW (NC), 2012 WL 4846522, at *2 (N.D. Cal. Aug. 7,
4 2012) (citing *United States v. C.B.S., Inc.*, 666 F.2d 364, 371–72 (9th Cir. 1982)); *see **Motion***
5 ***to Quash*** at 9.

6 2. The TCC’s Alternative Procedures Are Contrary to Rule 45. Rule 45 “protect[s] a person
7 subject to a subpoena” by, among other things, requiring individualized scrutiny of non-party
8 subpoenas, imposing mandatory cost and fee-shifting, and placing the burden on the issuing
9 party to compel compliance in the face of unresolved, properly served objections. *See* Fed. R.
10 Civ. P. 45(d); ***Motion to Quash*** at 10–17. The TCC’s requested procedures, however,
11 trivialize objections to just “a sentence of two” with “[n]o extensive argument or case law,”
12 which the TCC will somehow “aggregate” with everyone else’s objections for a special
13 master’s decision. *See* ECF Dkt. No. 5840 at 5–6. By design, and in conflict with Rule 45,
14 the TCC’s requested process eliminates any distinction between BVCI and dozens of other
15 unidentified non-parties (even though Rule 45 requires individualized scrutiny of each
16 subpoena and non-party), prohibits meaningful objections and briefing, omits the Rule’s
17 mandatory cost and fee-shifting, and alleviates the TCC’s burden to compel compliance. If
18 adopted, it would eliminate Rule 45’s core procedures and non-party protections—and thus
19 also violate Rule 83. ***Motion to Quash*** at 10–17; *id.* at 7–8, 12.

20 3. Rule 45 Adjudication Cannot Be Delegated. Additionally, the TCC’s proposal that non-party
21 objections under Rule 45 be delegated to a special-master would, if adopted, violate the law.
22 *See* Fed. R. Bankr. P. 9031 (“Masters Not Authorized”).¹

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25 ¹ Under Federal Rule of Bankruptcy Procedure 9031, bankruptcy “court[s] ha[ve] no power to appoint
26 a special master.” *See In re Renaissance Radio, Inc.*, No. 03-33479-BJH, 2019 WL 1503787, at *10
27 (Bankr. N.D. Tex. Apr. 4, 2019); *In re G-I Holdings, Inc.*, 323 B.R. 583, 616 n.35 (Bankr. D.N.J.
28 2005) (“In fact, Federal Rule of Bankruptcy Procedure 9031 explicitly precludes the bankruptcy court
from appointing special masters in cases and proceedings under title 11.”); *see also In re Schafner*,
C 01-1818 MMC, 2002 WL 1940297, at *1 (N.D. Cal. Aug. 13, 2002).

1 For the foregoing reasons, and those in its **Motion to Quash**, BVC I respectfully requests that
2 the Court deny the TCC's Alternative Procedures Motion, hear BVC I in accordance with Rule 45, and
3 quash the invalid Subpoena.

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5 Respectfully submitted,

6 Dated: March 2, 2020

Baker Botts L.L.P.

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8 By: /s/ Tina Ngo
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